The learned Magistrate considered the evidence of Mustafa Jaafar in its entirety and came to the conclusion that he was an unreliable witness, and that even if there was corroboration the evidence of Mustafa Jaafar could not be corroborated. I cannot find any fault with the approach adopted by the learned Magistrate. On this point, the Supreme Court of India in *Sarwan Singh v. State of Punjab* [1957] AIR SC 637, 641 held that:

> ...before the Court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first and initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then that is the end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered.

I have examined this case in its proper perspective and I am a unable to see any ground for interfering with the learned Magistrate's decision.

RE: BABY M (AN INFANT) (ADOPTION: CONSENT)

HIGH COURT, KUALA LUMPUR
DATO' DR. VISU SINNADURAI J.
[ADOPTION APPLICATION NO. 34-01-93]
[TOGETHER WITH ORIGINATING SUMMONS NO. 24-928-93]
13 JUNE 1994

FAMILY LAW: Adoption - Consent of natural parents - Natural parents retracted consent given to adoptive parents - Whether withholding of consent unreasonabe - Whether consent to be dispensed with - Test - Whether that of hypothetical reasonable parent - Welfare of child - Whether welfare of child a paramount factor - Adoption Act 1952 (Revised 1981) s. 5.

This was an application by Mr. and Mrs. A for an order that they be allowed to adopt a baby girl, M, who had been handed over to them for adoption by the natural parents, on the ground that the requirement of consent of the natural parents for the proposed adoption, being unreasonably withheld by the said natural parents, ought to be dispensed with.

The facts were that prior to the birth of M, by some arrangements made between Mrs. A and the natural mother, it was agreed that after birth, the infant would be given to Mrs. A for adoption. In pursuance thereof, on 21 September 1993, about one month after the birth of the infant, both Mrs. A and the natural parents consulted a solicitor to commence proceedings for the adoption of the infant, and following that a letter of consent was executed by the natural parents giving their formal consent to the adoption of the infant by Mr. and Mrs. A. With a view to the infant's adoption, the natural parents then entrusted the infant to the care of Mr. and Mrs. A.

The natural parents subsequently changed their mind about giving up the child for adoption and on 29 September 1993 filed an originating summons seeking the return of the infant. In their affidavits they alleged that they had not given their consent and that if consent had been given it was invalid as the same had been withdrawn. Hence the aforesaid application by Mr. and Mrs. A.

The issue that arose was whether in the circumstances of this case parental consent ought to be dispensed with on the ground that it was being unreasonably withheld.

Held:

[1] In determining whether consent had unreasonably been withheld by the natural parents, the test to be applied is the test of unreasonableness and not anything else. In this respect the Court must apply only the objective test and hence the decision in each case will depend eventually on the facts and circumstances of the particular case. It follows further that whether the withholding of the consent was reasonable or otherwise, the Court has to consider the totality of the facts and that no single factor alone is sufficient to determine reasonableness.

[2] The mere fact that the Court is satisfied that the order would be for the welfare of the child in the materialistic sense is not sufficient to allow the Court to dispense with the necessity of consent. Notwithstanding that, the consideration of the welfare of the child is still a major factor which the Court will always take into account in determining whether consent is being withheld reasonably or unreasonably. The future of the child in the years to come or even in the near future, therefore, would be a factor for consideration by the Court.

[3] The facts of this case showed that at the time the infant was handed over to the adoptive parents the infant was being neglected and in need of urgent medical treatment. Here was thus a situation where the natural parents had clearly neglected looking after the child while the child was still with them. Even at the time of the hearing of this application, the natural parents have not presented themselves as someone capable of caring for the infant and it is likely that the serious neglect of the child will persist if the child is returned to them. Bearing in mind the increase in the number of cases on child abuse, this neglect of the child by the natural parents therefore deserved considerable weight by the Court in arriving at a decision. To send the child back to the natural parents, with no clear assurance that the child will be cared for, is to take a risk which no reasonable person, let alone the Court, will take.

[4] The infant is being well-looked after by the proposed adoptive parents and a warm and loving bond appears to have been established between them and the infant. Throughout they had shown a keen interest to have the infant and there is no doubt at all that they are in a position to provide and give the infant a secure future. A hypothetical natural parent, applying an objective view of the needs of the infant, and considering the totality of the evidence, would say that consent in this case is being unreasonably withheld by the natural parents. In other words, a reasonable parent, in the circumstances of this case, would have granted his consent. This is a strong case for saying that consent of the natural parents should be dispensed with.

[Consent of the natural parents dispensed with].

Cases referred to:

Re F (an infant) [1957] 1 All ER 819 ***(refd)***
S & Anor. v. Huddersfield Borough Council [1974] 3 All ER 296 ***(refd)***
Re W (an infant) [1971] 2 All ER 49 ***(refd)***
Re TSY (an infant) [1988] 3 MLJ 43 ***(refd)***
Re S (an infant: parental consent) [1973] 3 All ER 88 (CA) ***(refd)***
TPC v. ABC & Anor. [1983] 2 MLJ 79 ***(refd)***
Re Thow Seng Yeap v. Khor Kar Chooi & Anor. [1989] 3 MLJ 482 ***(refd)***
Re Wan Yijun [1991] 1 MLJ 16 ***(cit)***
Re S S [1975] 1 MLJ 56 ***(cit)***
Re F (a minor) (adoption and parental consent) [1982] 1 All ER 321 CA ***(refd)***
Re A (a minor) (adoption: parental consent) [1987] 2 All ER 81 CA ***(refd)***
Re H & Anor. (minors) No. 3 [1991] 2 All ER 185 CA
Re L (1962) 106 Sol J 611 ***(refd)***
Re P (an infant) (adoption parental consent) [1971] 1 All ER 182 ***(refd)***
Re H and W (adoption: parental agreement) (1982) 4 FLR 614 ***(refd)***
Re M (a minor) [1987] 2 All ER 88 ***(cit)***
Re V (a minor) (adoption: consent) [1986] 1 All ER 752, 762 (CA) ***(cit)***
Re B (an infant) [1970] 3 All ER 1008 ***(refd)***
Re P (an infant) (adoption: parental consent) [1977] 1 All ER 182 (CA) ***(cit)***
Re C (an infant) [1964] 3 All ER 483 ***(refd)***
O'Connors & Anor. v. A and B [1971] 2 All ER 1230
Re H (infants) (adoption: parental consent) [1977] 2 All ER 339 ***(refd)***
Re M (a minor) (custodianship; jurisdiction) [1987] 2 All ER 88 CA ***(refd)***

Legislation referred to:

Adoption Act 1952, ss. 4(3), (4)(a), (b), 5(1)(c), 6(a), (b), (c), 10
Guardianship of Infants Act 1961, ss. 5(1), 11, 12(3), 13, 17(6)
Law Reform (Marriage and Divorce) Act 1976, s. 88
Adoption Act 1950 & 1958, s. 5(1)(b) (UK)
Adoption of Children Act (Singapore)
Children Act 1975, ss. 3, 12(5) (UK)

For the proposed adoptive parents - Susamma Thomas (Ranjit Kaur with her); M/s. Rashid & Lee
For the infant and the natural parents - Jayaletchumi Rajaratnam (Yasmeen Shariff with her); M/s. Lim Jaya & Co.

JUDGMENT

Dr. Visu Sinnadurai J:
At the conclusion of the hearing of this application, I made an order that the consent of the natural parents to the adoption of the infant was unreasonably withheld. In so making the order, I stated that as the case raised certain important issues relating to the adoption of an infant, my reasons for the decision would be given in a subsequent written judgment. I now give my reasons for the decision.

Preliminary Observations

In accordance with s. 10 of the Adoption Act 1952, the present proceedings were held in camera, and to maintain the confidentiality of the parties, as required by law, the names of the parties have been abbreviated so that their identities are not disclosed.

The petitioners in this adoption proceedings are the proposed adoptive parents (Mr. & Mrs. A) seeking an order for the adoption of a baby girl, M (hereinafter referred to as **the infant**). What appears to have started off as a friendly arrangement between the natural parents and the proposed adoptive parents (hereinafter referred to as the **proposed adoptive parents**), soon became fraught with animosity, causing aggravation to both the natural and the proposed adoptive parents. Undoubtedly, whatever decision this Court makes, will cause great pain and distress to one of them.

This case is one of considerable difficulty. Not only is it an unusual one relating to the custody and control of an infant, but also one involving the adoption of an infant, who was barely six weeks old at the commencement of these proceedings. The case became even more complex, when two simultaneous applications were made to this Court regarding the infant: one by the natural parents for the return of the infant; and the other, by the proposed adoptive parents for the adoption of the infant.

Undisputed Facts

The undisputed facts of this case are as follows: The natural mother gave birth to the infant, a baby girl, on 17 August 1993. Prior to the birth of the infant, the natural mother was known to the proposed adoptive parents (**Mr. and Mrs. A**) whilst she was working as a domestic maid, though where exactly she was working was disputed. There appears to have been some arrangement made between the mother of the infant and Mrs. A, whereby the mother agreed to give the infant to Mrs. A for adoption. It appears that pursuant to this arrangement on 21 September 1993, Mrs. A, together with both the natural parents consulted a lawyer at the lawyer's firm to commence proceedings for the adoption of the infant. As a result, a letter of consent was signed by both the natural parents which was attested before a commissioner for oaths, whereby the natural parents gave their formal consent to the adoption of the infant by Mr. and Mrs. A. After these consent papers were signed, Mr. and Mrs. A then took the infant to their own home in Damansara Heights.

The natural parents, subsequently, appeared to have had some second thoughts regarding the adoption of the infant. They then disputed the validity of this consent, and attempted to revoke the consent they had given earlier for the adoption of the infant by Mr. and Mrs. A. They also demanded the return of the infant.

Application for return of infant by natural parents

On 29 September 1993, about 8 days after the infant had been with Mr. and Mrs. A, an originating summons was filed by the natural parents seeking the return of the infant to them. In the affidavit supporting the application, the natural parents alleged that they had not given their consent to the adoption of the infant, and that the letter of consent which they had signed before the commissioner for oaths, was invalid. In a lengthy affidavit, the natural parents spelt out their version as to the circumstances under which their consent was obtained.

In reply, the proposed adoptive parents, Mr. and Mrs. A filed several affidavits stating in detail the circumstances under which the arrangement between both the parties for the adoption of the infant came about. Several documents, including photographs of the infant and a medical report were exhibited in the affidavit. Another affidavit was also filed by a friend of the adoptive parents. This affidavit by Margaret V gave an account of the events on 21 September

1993 when she accompanied Mrs. A and the natural parents to meet the lawyer.

On 8 October 1993, I heard the application of the natural parents, in the originating summons, pursuant to a certificate of urgency. At this hearing, it became obvious that the issue of consent, and the question of custody were closely related to the pending adoption proceedings. I, therefore, made an interim order, that pending the filing of proper adoption papers by the proposed adoptive parents, the infant was to remain with the adoptive parents for a period of one week, that is, until the next hearing date which was fixed, in a week's time, on 15 October 1993.

One major factor which influenced me in making this interim order in favour of Mr. and Mrs. A was the allegation that the infant was in urgent need of medical care, and that the infant was being well taken care of by Mr. and Mrs. A who had taken the infant to the doctor, and that the infant was still under observation by the doctor. At this stage, therefore, considering the welfare of the child, I was of the opinion that the medical treatment which the infant was receiving would best be continued under the care of Mr. and Mrs. A. The interim order also provided for access to the infant by the natural parents.

Guardianship proceedings

When hearing resumed on Saturday, 15 October 1993, Counsel for the natural parents sought the permission of the Court to pursue the hearing of the application for the infant under ss. 5 and 13 of the Guardianship of Infants Act.

Section 13 of the Guardianship of Infants Act provides as follows:

> Where an infant **leaves**, or is **removed** from, the custody of his lawful guardian, the Court or a Judge may order that he be returned to such custody, and for the purposes of enforcing such order, may direct an officer of the Court to seize the person of the infant and deliver him into the custody of his lawful guardian.
>
> [Emphasis added]

Section 5 provides as follows:

> Subject to s. 10, the father of an infant shall be the guardian of the infant's person and property:
>
> Provided that the Court or a Judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent.

Counsel for the proposed adoptive parents, however, pointed out, that whilst admitting that at this stage of the proceedings, the father of the infant, was in accordance with s. 5 of the Act, the guardian of the infant, s. 13 of the Act was inapplicable in the present case as the infant had **not** left, nor had been removed, from the custody of his lawful guardian (i.e., the father). In other words, the contention by the Counsel for Mr. and Mrs. A was that in the present case, the infant had not left, or been removed from, the custody of her lawful guardian but was, in fact, voluntarily handed over to the adoptive parents for purposes of adoption. It was argued that, as the infant left the custody of the lawful guardian with the express consent of both the natural parents, s. 13 was inapplicable to the present case.

Counsel for the adoptive parents also pointed out that as a petition for the formal adoption of the infant was being filed before this Court, this Court ought to determine the issue as to the return of the infant under the Guardianship of Infants Act, only **after** the hearing of the adoption application.

I then, without expressly deciding on the issue as to whether the application of the natural parents ought to be allowed, adjourned the matter to Monday, 18 October 1993, to allow the adoptive parents to file the necessary adoption papers. In the interim period, the earlier custody order which I had made, was extended until Monday, 18 October, and at the request of both the parties, and since the adjournment was only for two days, no order as to access was made during this brief adjournment.

On Monday, 18 October 1993, though adoption papers had been filed, Counsel for the natural parents once again made a request to address the Court on the application for the return of the infant under the Guardianship of Infants Act. As by this date, there had already been several prior hearings, but with no final decision being made, I was of the view that an opportunity should be given to the natural parents to present their case. I, then allowed Miss J. Rajaratnam, Counsel for the natural parents, to submit on the custody issue.

After hearing submissions, I indicated that in the circumstances of the case, and especially on the interpretation of s. 13 of the Guardianship of Infants Act, I was again inclined not to make such an order, especially so in the light of the pending adoption proceedings. It appeared to me that at that stage of the proceedings, as the child was lawfully handed over to Mr. and Mrs. A for purposes of adoption, and as the question of consent of the natural parents played a significant role, and that the custody issue was closely related to the adoption proceedings, the matter ought to be deferred until the issue of consent was clearly settled. As a consequence, I ruled that the final decision on the originating summons ought to be deferred until the hearing of the application for adoption.

Counsel for both the parties, then agreed that the decision on the custody matter be deferred until the application for adoption by the adoptive parents was considered. However, at my suggestion, it was agreed that only one issue relating to the adoption, that is, the issue of consent, be heard first as a preliminary issue.

Again, because of the urgency of the matter, and in considering the welfare of the infant, as well as to avoid further anxiety to both the natural parents, as well as the proposed adoptive parents, an early date was fixed by this Court, despite a already tight schedule of cases which had been earlier fixed for hearing, for the hearing of the adoption proceedings. Pending the hearing of the adoption proceedings, I, being satisfied that the infant was still receiving medical treatment and was being well-cared for by Mr. and Mrs. A, made an interim custody order for the care of the infant to be left with the adoptive parents, with access to the natural parents.

The hearing of the preliminary issue on consent then commenced.

Adoption proceedings

As stated earlier, though this action is an application for adoption, this judgment deals only with one aspect of the adoption proceeding, that is the requirement of the consent of the natural parents.

At the outset, I should point out that I have been mindful that adoption proceedings are one of the "most anxious jurisdictions" which fall on the Courts, especially so when:

> an adoption ... is a permanent change in the status of the person adopted, and may alter his or her citizenship. It alters the family to which he or she belongs. It alters both the child's rights and the child's duties as a citizen of this country. It is, therefore, a matter which at the best, and even when unopposed, must be looked at with great circumspection as so momentous a change is to be made in a child's life, the child having in ninety-nine cases out of a hundred no say in the matter, because he or she is too young. per Harman J. in *Re F (an infant)* [1957] 1 All ER 819.

The Adoption Act 1952 (Revised 1981), Act 257 provides for the adoption of children. This Act, unlike the Singapore Adoption of Children Act, has its origin in the English Adoption Act of 1950 (but see now the Children Act 1975).

(a) Pre-requisite for adoption

Amongst the requirements stipulated by the Adoption Act 1952 which are relevant for the present purposes pertaining to the adoption of the infant, are:

(i) except under certain expressly provided circumstances, consent of the parent or guardian of the child is required;

(ii) the child has been continuously in the care and possession of the proposed adoptive parents for at least 3 consecutive months immediately preceding the date of the adoption order [s. 4(4)(a)];

(iii) the adoptive parents have informed a social welfare officer of their intention to apply for an adoption order at least 3 months before the date of the adoption order [s. 4(4)(b)];

(iv) the adoptive parents must be ordinarily resident in West Malaysia [s. 4(3)].

(b) Court's duty in adoption proceedings

The Act provides that the Court, before making an adoption order, ought to be satisfied of the following:

(i) that the natural parents who have consented to the adoption understand the nature and effect of the adoption order, in particular that the effect of the adoption

order will permanently deprive them of their parental rights [s. 6(a)];

(ii) that the order if made will be for the welfare of the child [s. 6(b)];

(iii) that neither the adoptive parents nor the natural parents have received any payment or other reward in consideration of the adoption [s. 6(c)].

It will be noticed that the welfare of the child is only one of the three factors which the Court needs to consider before making a final order for adoption. Therefore, the nature of the proceedings in an adoption application is different to that applicable in cases of custody of infants under s. 11 of the Guardianship of Infants Act, or under s. 88 of the Law Reform (Marriage and Divorce) Act 1976, where the first and paramount consideration is the welfare of the infant.

(c) Effect of adoption order

By virtue of the Adoption Act 1952, the effect of an adoption order made by a Court is that all rights, duties, obligations and liabilities of the natural parents are extinguished and these rights, duties, **etc.** shall become vested in the adoptive parents. In other words, once an adoption order has been made, the child is, for all intents and purposes, treated as a child born to the adoptive parents and the child shall have the right of inheritance, **etc.** as if the child was born to the adoptive parents. The adoptive parents, on their part would have the same legal obligations to the child as if she was their own natural child.

Procedure for Adoption

(a) Guardian ad litem

When an application for an adoption order is made to the Court, s. 12 of the Act provides that the Court may appoint a guardian *ad litem* of the child. As soon as the guardian *ad litem* has been appointed, the Court shall fix a time for the hearing of the application [s. 12(3)]. Section 13 of the Act provides that it is the duty of the guardian *ad litem* to investigate as fully as possible all the circumstances of the child and the adoptive parents, and all other matters relevant to the proposed adoption, in order to safeguard the interest of the child. Amongst the matters which the guardian *ad litem* is required to investigate is whether the adoptive parents have the means and status to bring up the child suitably, and, what rights to, or interests in, property the child has. The guardian *ad litem* may also consider whether it is desirable, for the welfare of the child, that the Court should be asked to make an interim order, or if making an adoptive order to impose any particular terms or conditions.

(b) Interim Order

In certain circumstances, the Court may make an interim order, instead of a final order for adoption, as provided for in s. 17 of the Act. Section 17 provides that where all the prerequisites for an adoption have been satisfied, the Court, instead of making a final adoption order, may make an interim order giving the custody of the child to the applicants for a period of six months to two years by way of a probationary period upon such terms as regard provisions for the maintenance, education, and supervision of the welfare of the child: as to the scope of this section see the Court of Appeal's decision in *S & Anor. v. Huddersfield Borough Council* [1974] 3 All ER 296. The said section expressly provides that the interim order shall **not** be made in any case where the making of the adoption order would be unlawful: s. 17(6).

I make these general observations on the statutory requirements relating to the adoption of a child, so as to give a general outline of the various aspects involved in adoption proceedings. However, as stated earlier, for purposes of this decision, I am only concerned with one aspect of the statutory requirement: consent of natural parents to the adoption. It is therefore not necessary for me at this stage to deal with the other statutory provisions of the Act, except for s. 5 which deals with the issue of consent.

I now move on to consider whether the requirements of the law relating to the consent of the natural parents have been complied with in the present application for the adoption of the infant in question.

Consent

As pointed out earlier, amongst the most important requirements that the Court must be satisfied of before making any adoption order, are (i) the consent of the natural parents; and (ii) the need for the child to be in the continuous care and possession of the adoptive parents for a period of at least three months immediately preceding the date of the order.

As a general rule, the consent of the natural parents of a child is a pre-requisite to any adoption of the child. However, the Court may, under certain specified circumstances, dispense with this consent. These circumstances are spelt out in s. 5(1) of the Act. The relevant parts of the section provide as follows:

> **Provided that the Court may dispense with any consent required by this section if satisfied:**
>
> (a) in the case of a parent or guardian of the child, that he has abandoned, neglected or persistently ill-treated the child;
> (b) in the case of a person liable as aforesaid to contribute to the support of the child, that he has persistently neglected or refused so to contribute;
> (c) in any case, **that the person whose consent is required** cannot be found or is incapable of giving his consent or **that his consent is unreasonably withheld**; or
> (d) in any case, that in accordance with the provisions of any written law relating to the adoption of children for the time being in force in any country any competent authority has given permission or granted a licence authorizing the care and possession of the child to be transferred to the applicant.
>
> [Emphasis added]

In the present case, the natural parents contend that no consent was given; and secondly, that even if such a consent had been given, it was invalid. It would appear, therefore, that what the natural parents are contending is that there was no consent given at all to the proposed adoption of the infant, or that even if such consent was initially given, it had been withdrawn. The proposed adoptive parents, on the other hand, contend that the consent originally given by the natural parents was valid, or alternatively, that this Court, may dispense with the requirement of consent on the ground that the consent by the natural parents is unreasonably being withheld.

As the natural parents have now taken the stand that they do not wish to give their consent to this adoption, the effect of this is that, even if the consent given by them initially was valid, it had now been revoked by the natural parents. As such, Counsel for both the parties agreed that this application for adoption ought to proceed on the basis that there was no express consent given by the natural parents, and that the issue relating to consent be limited to whether the consent may be dispensed with by the Court on the ground that it was being unreasonably withheld by the natural parents.

One has to also bear in mind that in an adoption proceedings, a great deal of emotional feelings are involved. In such cases, it is not uncommon for the natural parents to vacillate in circumstances of considerable difficulty and stress over a comparatively short space of time. It is for this reason that it is clearly established by case law that the question of consent has to be determined as at the date of the hearing, and not earlier. Lord Hailsham in *Re W (an infant)* [1971] 2 All ER 49, at p. 55 observed:

> The test is whether at the time of the hearing the consent is being withheld unreasonably.

See also *Re TSY (an infant)* [1988] 3 MLJ 43; and *Re S (an infant: parental consent)* [1973] 3 All ER 88, CA.

Therefore, as such, in the present case it must be taken to be the situation that on the date of this hearing, there was no express consent given by the natural parents.

In the light of this, I then move on to consider whether the consent of the natural parents may be dispensed with in the present case on the ground that it is unreasonably withheld.

Unreasonably Withholding Consent

There is very little case law in Malaysia relating to the scope of s. 5 of the Adoption Act. There appears only to be two reported decisions of the Malaysian Courts dealing with the issue of unreasonably withholding consent. In *TPC v. ABC & Anor.* [1983] 2 MLJ 79, and *Re TSY (an infant)* [1988] 3 MLJ 43, Edgar Joseph Jr J. (as he then was) observed that an objective test was applicable in determining whether consent was being unreasonably withheld. However, when *Re TSY (an infant)* went on appeal to the Supreme Court (reported as *Re Thow Seng Yeap & Anor. v. Khor Kar Chooi & Anor.* [1989] 3 MLJ 482), no specific test to determine whether consent was unreasonably withheld by the natural parents was spelt out by the Supreme Court.

As the relevant provision relating to consent under the Singapore Adoption of Children Act is different, the Singapore cases of *Re Wan Yijun* [1991] 1 MLJ 16, and *Re SS* [1975] 1 MLJ 56, provide little assistance. For this purpose, one has therefore to consider the position in other

jurisdictions with similar provisions as that contained in our Adoption Act. The English Courts, in interpreting a similar provision of the English Act (the Adoption Act 1950 and 1958, before the introduction of the Children Act 1975), have held that in considering whether to dispense with parental consent on the ground that it was being unreasonaoly withheld, an objective test ought to be applied.

The authoritative exposition of the law is to be found in the House of Lords decision in *Re W (an infant)* [1971] 2 All ER 49, which has consistently been followed by all subsequent English cases, dealing with the issue of dispensation of consent by the natural parents. (The decision remains unaffected even with the introduction of the English Children Act 1975: see, for example, *Re F (a minor) (adoption and parental consent)* [1982] 1 All ER 321, 329-330, CA; *Re A (a minor) (adoption: parental consent)* [1987] 2 All ER 81, CA; and *Re H & Anor. (minors) No. 3* [1991] 2 All ER 185, CA).

All the Law Lords (Lord Hailsham LC, Lord Mac Dermott, Lord Hodson, Lord Guest and Lord Donovan) in this leading House of Lords decision dealing with the dispensation of consent, stated that the correct test was that as stated by Lord Denning MR in *Re L* (1962) 106 Sol J 611. Lord Denning in this case observed:

> In considering the matter I quite agree that: (1) the question whether she is unreasonably withholding her consent is to be judged at the date of the hearing: and (2) the welfare of the child is not the sole consideration; and (3) the one question is whether she is unreasonably withholding her consent.
>
> But I must say that in considering whether she is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable; but still it may be unreasonable for her to withhold consent.
>
> We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case.

This observation of Lord Denning, as stated above, was expressly approved by the House of Lords in *Re W (an infant)*. Lord Hailsham further elaborated that (at p. 55):

> From this it is clear that the test is reasonableness and not anything else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness, and reasonableness in the context of the totality of the circumstances.
>
> But, although welfare *per se* is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent must so regard it.

Again to re-emphasise this point, Lord Hailsham added (at p. 54):

> Section 5(1)(b) [of the English Adoption Act 1958 which is in *pari materia* with the proviso to s. 5(1)(c) of the Malaysian Adoption Act 1952] lays down a test of reasonableness. It does not lay down a test of culpability or of callous or self-indulgent indifference or of failure or probable failure of parental duty.

It is clear that the test to be applied by the Courts in determining whether consent had unreasonably been withheld by the natural parents is the test of reasonableness and not anything else. Of course, what is reasonable or unreasonable is a question of fact, and not a question of law. The Courts must apply only the objective test, and not a subjective test, the decision in each case depending on the facts and circumstances of the particular case.

Meaning of reasonable: Question of fact

Lord Hailsham in *Re W (an infant)*, stated at p. 56:

> reasonableness, or its opposite, must be judged ... by an objective test (as distinct from a subjective test) ... 'reasonableness' or 'unreasonableness' where either word is employed in English law, is normally a question of fact and degree, and not a question of law, so long as there is evidence to support the finding of the Court ... [The] Judge applying the test of reasonableness must be entitled to come to his own conclusions, on the totality of the facts.

His Lordship, however, cautioned (at p. 56):

> ... it does not follow from the fact that the test is reasonableness that any Court is entitled simply to substitute its own view for that of the parents. In my opinion, it should be extremely careful to guard against this error. Two reasonable parents can perfectly come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.

Totality of the Evidence

In determining whether the withholding of the consent was reasonable or otherwise, the Court, therefore, has to consider the totality of the facts. No single factor alone is sufficient to determine reasonableness.

Lord Hailsham LC in *Re W (an infant)* pointed out:

> In coming to its decision on the facts, it seems to me ... that the Court must have regard to the totality of the evidence. No doubt there are factors in the scale which in any given case must weigh comparatively little, ... All the same it is to the totality of the relevant circumstances that the Court should look into in coming ultimately to the decision that withholding consent is or is not unreasonable. [At p. 57].

His Lordship, however, added, (at p. 57):

> in my opinion it is extremely dangerous merely because a factor weighs little or nothing in the circumstances of a particular case, or of most particular cases, to argue from that, that it should not be 'put into the scales' at all, or that because a totality of inconclusive factors taken individually weigh little, to weigh them collectively is, as it were, to add nought to nought and produce a digit.

Principles applicable

I can do no better than to quote the words of Lord Mac Dermott in *Re W (an infant)*, in summarising the principle applicable in determining the issue of consent when it is being withheld by the parents. His Lordship spelt out these principles as follows (at p. 64):

(1) the word 'unreasonably' is to be construed according to its natural significance and not as importing words of guilt or misconduct such as 'culpable', 'blameworthy' or 'self-indulgent indifference';

(2) so construed, the test for deciding whether consent has been withheld unreasonably is to ask what a reasonable parent, placed in the position of the parent in question, would do;

(3) the test is objective;

(4) in general, the provisions of the Act require that a finding of unreasonableness should be based on grounds which are well established and of substance;

(5) in particular, where the test of unreasonableness falls to be applied in relation to the welfare of the child, the degree of unreasonableness to be proved must be marked in the sense that the parent, whose consent is withheld, has ignored or disregarded some appreciable ill or risk likely to be avoided, or some substantial benefit likely to accrue if the child is adopted.

Factors to be considered in determining reasonableness

It is often said that the test in determining reasonableness is that of a hypothetical reasonable parent. However, the actual application of the test causes considerable difficulties to Judges. As Ormrod LJ said in *Re P (an infant) (adoption: parental consent)* [1971] 1 All ER 182, at p. 191:

> The hypothetical reasonable parent test is artificial. It requires the Judge to put himself into the position of the hypothetical parent and examine the situation through the eyes of such a person, rather than with his own, but it is not an impossible task.

(a) The hypothetical reasonable natural parent

In determining whether a hypothetical reasonable natural parent would or would not withhold consent, the Courts have to bear in mind a number of factors: As Purchas LJ in *Re H and W (adoption: parental agreement)* (1982) 4 FLR 614, at 624-625 (as approved in *Re M (a minor)* [1987] 2 All ER 88) said:

> The Court must, therefore, look to the attitude of the natural parent as one of the potentially relevant factors when assessing the attitude of the hypothetical, reasonable, natural parent. Where the natural parent presents himself or herself at the time of the hearing as someone capable of caring for the child, this is a factor which even the hypothetical, reasonable parent should take into account together with the other circumstances of the case including, of course, the ultimate welfare of the child.
>
> Where there is an inherent defect likely to persist in the natural parent, as was the case in *Re D (an infant) (parent's consent)* ([1971] 1 All ER 145, [1977] AC 602) this is clearly an important factor; but where the unsuitability of the parent can only be related to past history, bearing in mind the provisions of s. 12(5) [of the Children Act 1975], unless the past history is likely to influence the future position, as was the case in *Re F* (1981) 3 FLR 101, then it should carry little weight in the mind of the hypothetical, reasonable, natural parent.

> The chances of a successful reintroduction to, or continuance of contact with, the natural parent is a critical factor in assessing the reaction of the hypothetical, reasonable parent as was recognised in *Re F*.

These principles stated by Purchas LJ were approved by Glideswell LJ in the Court of Appeal decision of *Re M (a minor)* [1987] 2 All ER 88 at 94 and by Oliver LJ in *Re V (a miror) (adoption: corsent)* [1986] 1 All ER 752, 762, CA.

Welfare of child

One major problem confronting the Courts has been the question of the welfare of the child. As stated earlier, in adoption proceedings, unlike the position in custody cases, the law provides that the welfare of the child is only one of the factors to be considered by the Court; whereas in custody cases the welfare of the child is the main consideration. However, it does not necessarily follow that in determining the reasonableness of withholding consent in adoption proceedings, the welfare of the child plays little importance. Whilst there was some uncertainty earlier on this aspect of the law, the House of Lords in *Re W (an infant)*, in approving Denning LJ's test in *Re L (an infant)* stated earlier, has now firmly established that the welfare of the child is a factor to be considered in determining reasonableness. As Lord Denning in *Re L (an infant)* observed:

> In determining whether she [the mother] is reasonable or unreasonable we would take into account the welfare of the child.

However, the Court cannot substitute its own findings as to the welfare of the child - the question is whether in considering the welfare of the child, the mother is unnecessarily withholding consent. In *Re W (an infant)*, Lord Hodson approved the following statement made by Davies LJ in *Re B (an infant)* [1970] 3 All ER 1008 at p. 1012, where His Lordship said:

> ... from nearly all the judgments ... it is apparent that one of the matters which should be taken into consideration is the welfare of the child. Perhaps it would be more accurate to say that one of the matters which a parent ought reasonably to take into consideration in deciding whether or not to withhold consent should be the prospects and outlook for the child if adopted as compared with those if unadopted; these prospects would include material and financial prospects, education, general surroundings, happiness, stability of the home and the like.

Lord Hodson observed (at p. 73):

> I cannot improve on this statement which is, I think, consistent with an equally valuable statement of Lord Denning in *Re L (an infant)* ...

Further, Lord Hailsham in *Re W (an infant)* said (at p. 55):

> But although welfare *per se* is not the test, the fact that a reasonable parent does not pay regard to the welfare of his child must enter the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is **decisive** in those cases where a reasonable parent must so regard it.
>
> [Emphasis added]

On the other hand Diplock LJ in *Re C (an infant)* [1964] 2 All ER 483, cautioned (at p. 494):

> It is clear law that the mere fact that the Court is satisfied that the order would be for the welfare of the child in the materialistic sense is not sufficient to allow the Court to dispense with consent.

It should perhaps also be pointed out that whilst the English Children Act 1975 now provides a new test for the Courts to apply before a final order for adoption is granted, that is, by now providing under s. 3:

> that in reaching any decision relating to the adoption of a child, a Court ... shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood ...,

the test to be applied in determining the reasonableness of the withholding of the consent of the natural parents, remains unaffected: see generally *Re P (an infant) (adoption: parental consent)* [1977] 1 All ER 182 (CA), 184-185.

Other parties:

One other factor which the Court has to weigh in deciding whether the consent is being unreasonably withheld is the position of other parties, other than the natural parents, who would be affected by the adoption. In *Re C (an infant)* [1964] 3 All ER 483, Pearson LJ said:

> ... the primary consideration ought to be the reasonableness of the mother's attitude in relation to the child rather than other persons concerned. I would think it right that it is primarily the welfare of the child that the mother should have in mind; but of course, **it is**

> **also relevant to consider the effect of her decision on other persons - on herself, on the adoptive parents** (that is to say the foster parents, who wish to adopt), **and on any other person concerned,** who in this case would be the elder brother, the other adopted child of the foster-parents.
>
> [Emphasis added]

Finally, Lord Reid in the House of Lords decision in *O'Connors & Anor. v. A and B* [1971] 2 All ER 1230, 1232 observed:

> The test is an objective test - would a reasonable parent have withheld consent? I think that a reasonable parent or, indeed, **any other reasonable person, would have in mind the interests or claims of all three parties concerned** - the child whose adoption is in question, the natural parents, and the adopting family. No doubt the child's interests come first and in some cases they may be paramount. But I see no reason why the **claims of the natural parents** should be ignored. ... And the **adopting family** cannot be ignored either. If it was the mothers's action that brought them in, in the first place, they ought not to be displaced without good reason.
>
> [Emphasis added]

His Lordship added:

> So to balance these claims is no easy task. Often no ideal solution is possible. We are dealing largely with future probabilities for the decision once made is irrevocable. So we cannot be certain what will be in the child's best interests in the long run. That seems to me to be an additional reason for giving considerable weight in proper cases to the claims of the natural parents and of the adopting family.

Factors in the present case

Bearing in mind, the above principles of law and the fact that each case must depend on its own facts and circumstances, I now move on to consider whether the withholding of the consent by the natural parents, in the present case, is reasonable or unreasonable. Case law on this issue, provides little assistance. In any case, as I have observed earlier, there is a dearth of cases dealing with this particular issue in Malaysia.

The salient features of this case are as follows. The natural parents, both Malaysians of Indian origin, have five other children, besides the infant, ranging from the ages of 9 to 2 $^{1}/_{2}$ years. They live in a squatter area of Kuala Lumpur, in a one-room house. The mother has been working as a domestic help before the birth of the infant. When she goes out to work, the other children who are not at school, are looked after by a relative. The father does not live with the family. He has been working in Singapore, and Penang and returns to Kuala Lumpur during the weekends. The frequency of his return is unclear. His monthly salary is also uncertain. He did not appear to have a fixed monthly salary. Though, the mother said that he gave her a monthly allowance to meet the expenses of the family, quite obviously this sum was insufficient, as this appears to be the reason as to why the mother decided to work.

The mother appears to be a quiet woman, whereas the father appears to be the stronger of the two. Before the birth of the infant, the mother decided to give the child away for adoption. Initially, the father appeared to have agreed to this plan. Both the parents went to see the solicitors who prepared the formal papers for adoption. They even handed over the infant to the adoptive parents. However, soon after that, there was a change of heart. What exactly triggered off this change of mind is unclear. Whether it was because they were disappointed with the non-fulfilment of certain expectations, or whether it was for some other reason is also not made clear. There is, however, no clear suggestion that the parents were expecting something in return, for the adoption. The payment of any reward for the adoption of a child, is, of course, prohibited by the Adoption Act, though I am given to understand that such a practice is prevalent, but never admitted in Court. In any case, I need not inquire as to the motives or reasons as to why the natural parents changed their minds. That was a right which they had, and their change of mind should not count much in my consideration as to whether the withholding of their consent is reasonable or unreasonable. But, I should stress that the original decision of the natural parents, of course led to the infant being entrusted to the care of the adoptive parents with a view of their adoption of the infant. This is not a case of an infant being taken away from its parents against their wishes. It was the natural parents themselves who initially agreed to give the infant up for adoption, and subsequently gave some form of formal consent.

The proposed adoptive parents, are British nationals, both aged 37, currently living in Malaysia. Mr. A works for a company in Kuala Lumpur and his monthly salary is about RM12,000. They have two children - 2 boys of the ages 4 and 6

years. Mrs. A said in evidence that they had always wanted a daughter, but because Mrs. A is unable for medical reasons to bear any more children, agreed to adopt the infant. During the period, when the interim custody was granted to them, they had become very attached to the child. A warm and loving bond appears to have been established between them and the infant. Throughout, they had shown a keen interest to have the infant. There is no doubt at all that they are in a position to provide and give the infant a secure future.

I should, however, emphasise that the fact that the adoptive parents are better off financially when compared to the natural parents is not a major factor which I should consider. There was much submission on this point. What, however, is important to bear in mind is not so much as to whether the natural parents are poor or wealthy, for this is no criteria for a happy and a well-cared family, but whether the adoptive parents are in a position to provide for a child which they intend to adopt. As Diplock LJ said in *Re C (an infant)* [1964] 3 All ER 483 at p. 494:

> It is clear law that the mere fact that the Court is satisfied that the order would be for the welfare of the child in the materialistic sense is not sufficient to allow the Court to dispense with the consent. The welfare state has not yet reached the stage that it can override the rights and duties of parenthood in the interests of comparative affluence of the child.

I therefore place, little weight on the issue as to the relative wealth of the parties. But the future welfare of the infant is certainly a factor, which a hypothetical mother will consider in deciding whether consent should be given.

Now I move on to consider what I regard as the most important factor to be taken into account, namely, the future of the child in the years to come, or even in the near future. The welfare of the child, though said not to be of the foremost consideration, is nevertheless, an important consideration. As stated earlier, Lord Denning MR in *Re L*, above, said:

> But I must say that in considering whether the [natural mother] is reasonable or unreasonable, we must take into account the welfare of the child.

The consideration of the welfare of the child, has therefore always been a major factor which the Courts have taken into consideration in determining whether consent is being withheld reasonably or unreasonably. Under English law, this has always been the position, and with the coming into force of the Children Act 1975 (UK), even greater importance is now placed on the welfare of the child. Ormrod LJ in the Court of Appeal decision *Re H (infants) (adoption: parental consent)* [1977] 2 All ER 339, observed as follows (at p. 340):

> The attitude of the Court to the question of dispensing with consent, or holding that the consent is unreasonably withheld has changed over the years ... the relative importance of the welfare of the children is increasing rather than diminishing in relation to dispensing with consent.

When the infant was brought to the home of Mr. and Mrs. A, there is clear evidence, both from Mr. and Mrs. A, and more importantly, from the doctor, that the child was in urgent need of medical care. Dr. Harbans Verick who gave evidence as to the medical condition of the infant when the infant was brought by Mrs. A for treatment, said in her evidence that the condition of the child was "shocking, listless, irritable." She added, "She had the most extensive skin lesions I have seen on a baby of that age". When asked further what would be the consequence if the baby had not received medical treatment, Dr. Harbans Verick replied "Quite serious" (Notes of Evidence on p. 36). Dr. Harbans Verick, is a general practitioner, with 46 years experience and holds the following qualifications: Fellow of the Royal College, Edinburgh; Diploma in Child Health; MRCP in Paediatrics.

Dr. Harbans further added that the condition of the baby was such that it was "bordering on abuse". In her medical report, which was tendered as an exhibit, Dr. Verick stated the condition of the child when she first examined her to be as follows:

> She suffered extensive skin lesion, covered with multiple little scabs that had to be removed manually.
>
> 1. Napkin area. Rash extending to and above the napkin area to the waist and down to the thighs.
> 2. Umbilicus - had smelling discharge.
> 3. Neck - Rash extending to the back of the chest and behind the ears and down front of chest.
>
> Ammoniacal Dermatitis with super added bacterial fungal plus yeast infections in napkin areas.

Similar Dermatitis in neck area due to lack of hygiene, exposure to fresh air and dripping of milk, causing underlying sogginess and maceration.

The natural parents, on their part, dismiss Dr. Harbans's findings by saying that the infant was merely suffering from "nappy rash". In view of the overwhelming evidence of Dr. Harbans, I find that the infant was neglected and in need of urgent medical treatment.

I must admit that this neglect of the child was a factor which carried considerable weight in my decision. Here was a situation where the natural parents, who, having agreed to give the child up for adoption, had also neglected in looking after the child whilst the child was still with them. As to the weight which should be given to any medical evidence in cases such as these, see *Re C (an infant)* [1964] 3 All ER 483 CA.

I am also unsure as to what risks the child would be exposed to if she was ordered to be sent back to the natural parents. With the increase in the number of cases on child abuse, the responsibility of sending the child back to the natural parents, with no clear assurance that the child will be cared for, is a risk which no reasonable person, let alone the Court, will take.

Conclusion

This is a strong case for saying that the consent of the natural parents should be dispensed with. A hypothetical natural parent, applying an objective view of the needs of the infant, and in considering the totality of the evidence, would say that the consent is being unreasonably withheld by the parents. At the time of the hearing of this application, the natural parents have not presented themselves as someone capable of caring for the infant. The serious neglect of the infant, is likely to persist if the child was returned to the natural parents. In several cases, the Courts have been greatly influenced in arriving at their decision as to the reasonableness of the withholding of consent based on the neglect of the child by the natural parents: see *Re M (a minor) (custodianship: jurisdiction)* [1987] 2 All ER 88 CA; *Re A (a minor) (adoption: parental consent)* [1987] 2 All ER 81 CA. In referring to these cases, I am not saying that I have relied upon them. As stated earlier, each case must be decided on its own facts. In some of these cases, the neglect by the parents were much more severe than the present case. But these cases indicate the emphasis which the Courts place on the welfare of the child. I must, however, put on record that in the present case, there has been no evidence of wilful ill-treatment or any evidence of abuse by the natural parents. It is a case of sheer neglect.

The infant is being well-looked after by the proposed adoptive parents. Though it is understandable that the natural parents are withholding consent for their own personal feelings and reasons, I think a reasonable parent, bearing all the facts, and considering the welfare of the child, will grant his consent. These emotions of the natural parents, do not alter the circumstances which make it reasonable or unreasonable for the natural parents to give their consent. The desire of the natural parents to have their child must command deep sympathy, but this alone cannot dictate the Court's decision as to the reasonableness or otherwise of their refusal to consent to the adoption of the infant.

I therefore sadly hold, that in the present case, the relevant circumstances, particularly the welfare of the infant, which I must emphasise is not the sole basis, make the refusal of the consent by natural parents unreasonable. I take the view that this is a case where the circumstances are decisive and that a reasonable parent would also regard the withholding of the consent as unreasonable. I therefore order that the consent of the natural parents be dispensed with in this case.

As I have said earlier, this decision is bound to cause distress and heartache to the natural parents. But, such is the situation in cases such as these: either the natural parents or the proposed adoptive parents have to bear the pain.

Finally, I must remind the parties that my decision on this issue of consent, by no means brings this adoption proceedings to an end. There is still the need for the adoptive parents to comply with the other requirements of the Adoption Act before a final order for adoption can be made. Amongst the more important matters outstanding are the requirements of residence of the adoptive parents; the report of the welfare officer; and the welfare of the child, considered in the totality of the adoption proceedings.